In the Supreme Court

OF THE

United States

OCTOBER TERM, 1942

No. 271

LAWRENCE J. ROGGE and EUGENE ROGGE, copartners, doing business under the firm name and style of Sourdough Express, WILLIAM MILLER and MAX MILLER, copartners, doing business under the firm name and style of General Transportation Company, ALFRED GHEZZI, JR., BYRON GLEN ROBERTS, CLYDE GORDON, RICHARD ZEHNDER, and MORT CASS,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI
to the United States Circuit Court of Appeals
for the Ninth Circuit
and
BRIEF IN SUPPORT THEREOF.

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to the United States Circuit Court of Appeals for the Ninth Circuit.

To the Honorable Harlan Fiske Stone, Chief Justice of the United States, and to the Associate Justices of the Supreme Court of the United States:

Petitioners pray that a Writ of Certiorari issue to review the judgment of the Circuit Court of Appeals for the Ninth Circuit entered in the above entitled cause on June 8, 1942.

OPINION BELOW.

The opinion of the Circuit Court of Appeals is cited in the transcript of record (pages 81 to 87).

JURISDICTION.

The jurisdiction of the Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

STATEMENT OF THE CASE.

Petitioners are truckers engaged in transporting freight and merchandise over the Richardson Highway in Alaska (R. 8).

The controversy between petitioners and respondent has arisen out of the demands of the United States for the payment of "tolls" for the transportation of freight and merchandise over the Richardson Highway that has been shipped from Seattle, Washington,

consigned to merchants and miners of Fairbanks and other settlements of interior Alaska (R. 8).

The controversy was submitted to the District Court for the Territory of Alaska, Fourth Division, upon an "Agreed Statement of Facts" (R. 2-13), pursuant to the provisions of the Alaska Code for "Submitting Controversy Without Action" (Compiled Laws of Alaska, 1933, p. 735).

Richardson Highway.

The Richardson Highway was established over the public domain in 1903 (R. 3). Ever since its establishment it has been a free public highway, except as hereinafter stated (R. 4). It affords transportation from tidewater to interior Alaska. Its southern terminus is Valdez, its northern, Fairbanks. Its length is 371 miles (R. 3, 9).

Highway in competition with Alaska Railroad.

The Richardson Highway runs parallel to the Alaska Railroad, which is owned and operated by the United States. The Highway is in direct competition with the Railroad for ocean bound and other freight and merchandise shipped from the States and other parts of Alaska, consigned to merchants and miners of Fairbanks and vicinity (R. 8, 9).

Act of June 30, 1932, and regulation promulgated thereunder.

The pertinent part of the Act of Congress of June 30, 1932 (47 Stat. 446, 48 U. S. C. A. 321 (a) et seq.) provides that:

"With the approval of the President, the Secretary of the Interior shall have power, * * * *to make rules and regulations governing the use of roads, trails, and other works, including the fixing and collection of tolls where deemed necessary* and advisable in the public interest" (Emphasis supplied) (R. 5).

The Act is set forth in full on pages 4 and 5 of the Printed Record.

Pursuant to this Act, the Secretary promulgated the following regulation (R. 5-6):

"Tolls. For transportation of merchandise or freight over the Richardson Highway; there shall be charged and collected at or adjacent to the McCarty Ferry on the Tanana River, tolls equal to two and one-half (2½) cents per ton of such merchandise or freight passing that point multiplied by the number of miles such merchandise or freight has been or is being carried over the said highway; No vehicle hauling such merchandise or freight shall be allowed to pass the designated toll station except upon payment of the tolls as herein provided. It shall be the duty of the Governor of Alaska, as ex-officio Commissioner for the Interior Department, to cause the collection of the tolls to be made in such manner as may be found most convenient and practicable, and all moneys so collected shall be deposited in the Treasury of the United States as miscellaneous receipts.

"The usual ferry charges are not affected by these regulations."

Toll Station.

In 1935 a Toll Station was established adjacent to the McCarty Ferry on the Tanana River. The Toll Station is in charge of the Alaska Road Commission, an agency of the Department of the Interior. The McCarty Ferry crosses the Tanana River and is operated as a part of the Highway. The Tanana River is 280 miles north of Valdez and 91 miles south of Fairbanks (R. 6, 7).

Only freight that passes toll station subject to toll.

No *toll* is levied on any *merchandise or freight transported over the highway, that does not pass the Toll Station.* No tolls are charged pedestrians, automobiles, trucks, or other vehicles that use the Highway. It is only *freight and merchandise that is shipped to Valdez from Seattle and transported north of the TANANA RIVER that is compelled to pay tolls* (R. 7, 8). The amount of the toll on freight and merchandise transported from Valdez to Fairbanks is $9.27 per ton, plus ferry charge (R. 5, 6).

Sole purpose of regulation is to eliminate competition with the Alaska Railroad.

The sole purpose of the regulation is to suppress and eliminate competition over the Highway with the Alaska Railroad. That it has accomplished its purpose is manifest from the following stipulated fact (R. 9, 10):

> "That the practical effect of said regulations hereinabove set forth imposing a toll upon all freight and merchandise carried over said high-

way, as aforesaid, is to substantially eliminate competition over said highway with the railroad as to freight and merchandise transported beyond the Tanana River and to the north thereof."

QUESTIONS PRESENTED.

The questions presented by this Petition are:

(1) Does the Act of June 30, 1932, authorize the Secretary of the Interior to Regulate Interstate Commerce?

(2) May the Secretary of the Interior, *under the guise of a toll,* impose charges for the transportation of freight over the Richardson Highway that are *so oppressive that it destroys the very thing upon which it is levied* in order to create a monopoly in the Alaska Railroad?

(3) Does the 1932 Act authorize the Secretary of the Interior to impose, fix, and collect TOLLS for freight and merchandise transported over the Richardson Highway from Valdez to points north of the Tanana River, for the sole purpose of eliminating competition with the Alaska Railroad?

(4) Does the Act authorize the Secretary of the Interior (a) to convert the Richardson Highway into a toll road and operate it as such and (b) to impose and collect, for and on behalf of the United States, TOLLS or duties on freight and merchandise that is transported over the Highway in competition with the Railroad?

(5) Does the Act authorize the United States to demand the payment of TOLLS from petitioners, and to sue for the collection thereof?

Petitioners contend that it does not. Respondent contends that:

> "Both the language and the legislative history of the Act of June 30, 1932 * * * make it clear that Congress intended by that Act to confer on the Secretary of the Interior authority to protect the revenues of the Alaska Railroad by charging tolls on competitive traffic transported over the Richardson Highway." (Respondent's Brief 7, filed in the Circuit Court of Appeals.)

The Circuit Court of Appeals upheld respondent's contention.

REASONS FOR GRANTING THE WRIT.

I. The Circuit Court of Appeals, in upholding respondent's contention, has erroneously construed that portion of the Act, that provides that the Secretary of the Interior may:

> "make rules and regulations governing the use of roads, trails, and other works, including the fixing and collection of tolls,"

as to make it read, in substance:

> That the Secretary of the Interior, in order to protect the revenues of the Alaska Railroad, is *granted power to regulate Interstate Commerce,* by restraining the transportation of all freight and merchandise over the Richardson Highway

that is in competition with the Alaska Railroad; and, for this purpose, the Secretary of the Interior is hereby authorized:

(a) to convert the Richardson Highway—a free public highway—into a toll road, and to operate it as such;

(b) to levy and collect tolls or duties for and on behalf of the United States on all freight and merchandise transported over the Highway that is in competition with the Railroad;

(c) to make rules and regulations governing the fixing and collection of tolls;

(d) that the rate of said tolls shall be left to the discretion of the Secretary of the Interior;

(e) that no tolls shall be levied on freight or merchandise transported over said Highway that is not in competition with the Railroad; and no tolls shall be levied on pedestrians, automobiles, trucks, or other vehicles for the use of said Highway;

(f) that all tolls so collected shall be deposited in the Treasury of the United States as miscellaneous funds.

II. The Circuit Court of Appeals, in so construing the Act, has *extended and enlarged its plain language.* The Court has read into the Act the report of one House of Congress, namely the report of the Senate Committee on Commerce, in reporting this legislation. In so doing, the Court has disregarded the repeated decisions of this Court, and its own decisions, to the effect: (a) that the ***plain words of a statute must be given the meaning naturally attributable to them*** and

"if the language is clear it is conclusive"; and (b) that the *legislative history* of a statute cannot affect its interpretation where the language is clear.

U. S. v. Resnick, 299 U. S. 208, 210;

Osaka Shosen Kaisha v. U. S., 300 U. S. 98, 101;

Old Colony T. Co. v. Commissioner, 301 U. S. 379, 383;

Jeu Jo Wan v. Nagle (9 C. C. A.), 9 F. (2) 310;

Northern Commercial Co. v. U. S. (9 C. C. A.), 217 Fed. 33;

Banco Mexicano etc. v. Deutsch Bank, 289 Fed. 924, 928.

III. The Circuit Court of Appeals, in construing said Act, has violated the canon of construction:

> That statutes granting *tolls "being in restraint of common right to use the highways free of tolls,* are to be strictly construed and nothing is to be taken by implication" (65 C. J. 1144, Sec. 34; 1167, Sec. 66);

contrary to the applicable decisions of this Court and its own decisions.

Gould v. Gould, 245 U. S. 153, 62 L. ed. 211;

Northwestern Fertilizing Co. v. Hyde Park, 97 U. S. 659, 666;

Perrene v. Chesapeake & Del. Canal Co., 9 How. 171;

Haiku Sugar Co. et al. v. Johnstone (9 C. C. A.), 249 Fed. 103, 109.

IV. The Circuit Court of Appeals erred in determining that the charge imposed by the regulation was

a *toll* and not a *tax or penalty imposed to destroy the very thing upon which it is levied,* contrary to the applicable decisions of this Court in:

Freight Tax Cases, 82 U. S. 278;

Carley and Hamilton v. Snook, 281 U. S. 66, 73-74.

And:

Child Labor Tax Case, 259 U. S. 20, 66 L. ed. 817;

Hill v. Wallace, 259 U. S. 44, 66 L. ed. 822;

Trusler v. Crooks, 269 U. S. 475, 77 L. ed. 365;

U. S. v. Butler, 297 U. S. 1, 80 L. ed. 477;

Carter v. Carter Coal Co., 298 U. S. 238, 80 L. ed. 1160;

Hume-Sinclair Coal Min. Co. v. Nee, 12 F. Supp. 801.

V. The Circuit Court of Appeals erred in holding that the regulation did not arbitrarily, oppressively, and capriciously discriminate against petitioners, contrary to the decisions of this Court, as announced in:

Gulf v. Ellis, 165 U. S. 141, 155, 41 L. ed. 668;

Yick Wo v. Hopkins, 118 U. S. 356, 370, 30 L. ed. 226.

IMPORTANCE OF QUESTION INVOLVED.

The free use of the roads and highways of Alaska in Interstate Commerce—and particularly the Richardson Highway—is a matter of general and grave importance to the people of the Territory. Both the Highway and the Railroad were constructed and are

being maintained and operated to develop the resources of Alaska. Though parallel, they serve different sections, localities, and communities. Both are essential to the development and prosperity of interior Alaska. The statement in the Opinion of the Circuit Court of Appeals that because the Richardson Highway "is usable only four months out of the year, Congress, in 1914, authorized the construction of the Alaska Railroad", is incorrect.

The object and purpose of the Railroad, as declared in the Act authorizing it, is (R. 9):

> "To aid in the development of the agricultural and mineral or other resources of Alaska, and the settlement of public lands therein, and so as to provide transportation of coal for the Army and Navy, transportation of troops, arms, munitions of war, mail, and for other governmental and public uses, and for the transportation of passengers and property." (Act of March 12, 1914, 38 Stat. 305, 48 U.S.C.A. 301.)

If the judgment of the Circuit Court of Appeals is allowed to stand, the effect of it is to grant to the Secretary of the Interior a boundless and unregulated discretion as to the public roads of Alaska. He may convert particular roads into toll roads, and not others. He may *discriminate against* and practically *destroy the trade and commerce of one community, to the advantage and prosperity of another.* The commerce and trade that Valdez had with Fairbanks and interior Alaska, before the regulation was promulgated, has been destroyed and lost to the residents of Valdez, and to petitioners. Their loss, however, has been the

Alaska Railroad's and the town of Seward's gain. Clearly, the delegation of a discretion that destroys the business of petitioners and the trade and commerce of one community, to the advantage of another, in order to create a monopoly in the Alaska Railroad, is of the essence of pure and simple despotism.

It is inconceivable that Congress, by the Act of 1932, intended to delegate to the Secretary of the Interior such power. Such a delegation of authority is contrary to the declared policy of Congress as expressed in the Sherman Act, the Interstate Commerce Act, and the principles of Common Law in force in Alaska. Surely *such authority is not expressedly or impliedly granted by the plain words of the Act of June 30, 1932.*

We submit that the *correct interpretation of this Act* is a matter *of great importance* to petitioners and to the people of Alaska, and that it should be settled by this Honorable Court.

WHEREFORE, it is respectfully submitted that the Writ should be granted.

Dated, San Francisco, California,
July 27, 1942.

MORGAN J. DOYLE,
Attorney for Petitioners.

JOHN L. MCGINN,
Of Counsel.

Certificate of Counsel.

I hereby certify that I am attorney for the Petitioners in the above entitled cause, and that in my judgment the foregoing Petition is well founded in law and fact, and that said Petition is not interposed for delay.

Dated, San Francisco, California,
July 27, 1942.

Morgan J. Doyle,
Attorney for Petitioners.

John L. McGinn,
Of Counsel.